

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10**

AMAZON.COM SERVICES, LLC

Employer,

Case 10-RC-269250

and

**RETAIL, WHOLESALE AND
DEPARTMENT STORE UNION**

Petitioner.

**PETITIONER'S POST HEARING BRIEF IN SUPPORT
OF A MAIL BALLOT ELECTION**

Pursuant to the Hearing Officer's December 22, 2020 directive on the filing of briefs, the Petitioner respectfully submits this post-hearing brief in support of a mail ballot election.

I. Introduction.

1. The Board's decision in *Aspirus Keweenaw*, 370 NLRB No. 45 (2020) affirms longstanding Board law granting a Regional Director discretion to order a mail ballot election when "extraordinary circumstances" are present; a condition satisfied by the COVID-19 pandemic. The *Aspirus* decision, however, recognizes that COVID-19's impact varies by geography and time. Not every community has experienced widespread community transmission and even those that have may not be experiencing such at the time that the Regional Director is considering whether to direct a manual or mail ballot election. To help guide Regional Directors in exercising their discretion, the *Aspirus* decision sets out six "situations" to consider: "if one or more these situations is present that will normally suggest the propriety of using mail ballots under the directing a mail ballot election under the extraordinary circumstances presented by this pandemic." *Id.* p. 18. The "situations" present in this case are (1) a 14 day testing positivity rate in excess of 5 percent and a

14 day trend of increasing case counts and (2) an outbreak at Amazon's Bessemer facility. There is also the compelling consideration that Jefferson County's hospitals are overwhelmed and public health experts expect that it will get worse before it gets better.

2. Though the Employer makes much of its proposed safety measures for conducting a manual election, the extraordinary measures and control over voting that Amazon's proposes proves that Jefferson County Alabama is experiencing an unprecedented health crisis. Amazon has no control over the how the disease is transmitted in Jefferson County. Directing a mail ballot election in a county with a positivity rate of over 17 percent using the State's data but over 40 percent according to other trusted data sources is not an abuse of discretion under *Aspirus* notwithstanding Amazon's assurances that it can manage and direct a manual election that minimizes the risk of transmission.

3. Moreover, the Union objects to Amazon's proposal because it undermines a fundamental aspect of a Board conducted election; the election must be viewed and conducted in a neutral manner. Not only does Amazon propose to control every aspect of this election and thereby demonstrate its dominance over the voting process, a message that will surely not be lost on the employees lining up to vote, it proposes to confer benefits on government agents that violate the principle of neutrality. Buried in Amazon's proffer are a couple of startling and jaw dropping gems: (i) an offer "to arrange for transportation of Board agents from Atlanta or elsewhere to/from Bessemer AL" in expertly sanitized vehicles and a guarantee that the drivers will be Covid-19 free; (ii) an offer "to arrange for extra sanitation to take place at the hotels" Board agents will being stay at or better yet, if "logistically" easier, Amazon is willing to arrange for accommodations for Board agents, such as renting an entire floor or wing of a hotel and (iii) an offer to arrange for food delivery, a separate sanitized tent for the "safe consumption of food and drink by the Board agents

and “free wi-fi access” so Board agents can surf the web or shop on Amazon.com while eating meals in the tent.¹

4. To alleviate any concern the Union may have with Amazon providing these conveniences and benefits to Board agents, Amazon offers to include the Union and/or agree to limit its contact with Board agents to simply providing the services and accommodations listed. The Union’s response to this offer is the same response Sen. Mike Lee had when asked to reject Pennsylvania’s slate of electors: “Hell, no.” Without question, a mail ballot election is a safer and neutral method of conducting an election. Amazon’s vast resources do not entitle it to an election method of its choosing and the Region should firmly and categorically reject Amazon’s proposal.

II. Application of *Aspirus*’s guidance to the facts present in this Petition support directing a mail ballot election.

5. Though Board policy favors a manual election, a Regional Director’s “determination to conduct an election manually or by mail is subject to an abuse-of-discretion standard.” *Aspirus Keweenaw*, 370 NLRB No. 45 at p.3 (2020)(citing *National Van Lines*, 120 NLRB 1343, 1346 (1958). *Aspirus* identifies six “situations” that if one or more are present supports directing a mail ballot election and, barring some abnormal condition, such direction will be a proper exercise of discretion. *Golden State Foods*, 2020 NLRB Reg. Dir. Dec. Lexis 465 at *5-7 (Nov. 25, 2020). The six situations identified in *Aspirus* are the following:

- 1) The NLRB office tasked with conducting the election is operating under "mandatory telework" status.
- (2) Either the 14-day trend in the number of new confirmed cases of COVID-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher.

¹ See, Amazon’s Proffer of Testimony, [REDACTED] Certification, ¶¶69-72.

- (3) The proposed manual election site cannot be established in a way that avoid violating mandatory state or local health orders relating to maximum gathering size.
- (4) The employer fails or refuses to commit to abide by the GC Memo 20-10 protocols.
- (5) There is a current COVID-19 outbreak at the facility or the employer refuses to disclose and certify its current status.
- (6) Other similarly compelling considerations.

The Board in *Aspirus* found that in the presence of any of the above situations, Regional Directors must consider directing mail ballot election. However, the presence of any of these situations does not require a mail-ballot election. Furthermore, the Board stated that Regional Directors who direct mail-ballot elections in any of the above situations will not be found to have abused their discretion. *Golden State Foods*, 2020 NLRB Reg. Dir. Dec. Lexis 465 at *7 (citing *Aspirus Keweenaw*, 370 NLRB, slip op. at 8)

6. The evidence demonstrates that the second situation identified in *Aspirus* is present in Jefferson County, Alabama.² Amazon's Bessemer facility is located in Jefferson County. Board exhibit 7 shows that, as of December 5, 2020, the percentage of positive lab results rate (positivity rate) in Jefferson County exceeded 16 percent. The chart displayed on Board Exhibit 7 shows a prior week (i.e. Nov. 28, 2020) positivity rate of 14.8. As of December 19, 2020, the Alabama Department of Public Health's COVID-19 website (the same website from which Board Exhibit 7 is sourced) showed a positivity rate of 17.1 percent in Jefferson County. *See*, Union's Offer of Proof, Declaration of Dr. Suzanne E. Judd, ¶ 5. Indeed, the most recent data available from the

² The Board's decision presumes that county-level data is the appropriate geographic unit and instructs Regional Director's to consider county-level trends and positivity rates if available. *Aspirus*, 370 NLRB No. 45, slip op. p. 6.

ADPH's website shows a weekly positivity rate of 22.16 percent as of January 2, 2021.³ By any measure, this is a staggering increase which demonstrates that Jefferson County is experiencing widespread community transmission. It is far above the 5 percent rate the Board in *Aspirus* indicates supports directing a mail ballot election.⁴

7. In addition to an increasing positivity rate, the number of cases in Jefferson County has also increased over the preceding two week period. According to John Hopkins University's COVID-19 Status Report (the same site that Board Exhibit 7 draws upon) cases in Jefferson County have increased by approximately 3,000 per week. On December 24, 2020, JHU's Status Report shows forty-eight thousand (48k) confirmed cases in the County. On December 31, 2020, the number increased to fifty-two thousand and three hundred (52.3k) confirmed cases and on January 6, 2021 (the most recent data available) confirmed cases in the County now stands at fifty-six thousand (56k).⁵

8. This trend of increasing cases is further reflected in other metrics. Dr. Judd notes that as of December 31, 2020 (the date of her declaration) Jefferson County had a weekly average rate of 80 daily cases per 100,000. *See*, Union's Offer of Proof, Declaration of Dr. Suzanne E. Judd, ¶ 7. For the past week, the average weekly rate of daily cases in Jefferson County is 94.3 per 100,000.⁶

³Alabama Dept. Public Health COVID-19 Risk Indicator Dashboard Index
<https://alpublichealth.maps.arcgis.com/apps/opsdashboard/index.html#/b585b67ef4074bb2b4443975bf14f77d>

⁴ Dr. Judd observes that the bamatracker website is by public health and medical officials in Alabama and that this site reflects a much higher positivity rate of 40.6 percent for Jefferson County for the week ending December 26, 2020. This rate is much closer to the State-wide positivity rate of 46.41 percent for the past week as reflected on JHU's COVID Status Report. *See*, <https://coronavirus.jhu.edu/region/us/alabama>.

⁵ <https://coronavirus.jhu.edu/us-map> (Jefferson County, AL)

⁶ <https://coronavirus.jhu.edu/region/us/alabama> ("past week" tab for Alabama map and Jefferson County)

9. Amazon's fulfillment center is not immune to the SARS-COV-2 virus running rampant in Jefferson County. There is a current COVID-19 outbreak at BHM1 based on the preceding 14 day number Amazon reports. In its proffer, Amazon admits that in the "preceding 14 day period", it recorded 40 cases of COVID.⁷ Amazon's proffer is somewhat vague about how it arrived at this number. Based on the numbers Amazon's has self-reported, however, Dr. Judd after explaining the data limitations calculated a 14 day average daily case rate for the BHM1 facility of 48 daily cases per 100,000. *See*, Union's Offer of Proof, Declaration of Dr. Suzanne E. Judd, ¶ 8. This 14 day case rate exceeds the Harvard Global Health Institute's recommendation of less than 25 daily cases per 100,000 in order to consider in person activities safe. *Id.* at ¶ 7. Indeed, if Amazon were not deemed an essential business, it would not be allowed to operate with such a high daily case rate. Amazon's own numbers indicate that it has experienced a COVID-19 outbreak at the facility and based on what is occurring in Jefferson County, Dr. Judd offers the opinion that is likely "Amazon is not catching all the cases at the fulfillment center meaning the burden of the disease is even higher." *Id.* ¶ 8.

10. Amazon's experience in Robbinsville, New Jersey shows how quickly a COVID-19 outbreak can get out of control even with an expert designed and approved COVID safety protocol. Amazon operates a sortable robotic fulfillment center in Robbinsville, New Jersey which is the same type of center operated in Bessemer, AL.⁸ Because of the extensive outbreak (48

⁷ Amazon's proffer does not specify the exact 14 day period and one is left to assume that it covers the 14 day period preceding the preparation of [REDACTED] certification. More importantly, [REDACTED] certification states that 40 employees were tested by Project UV and "fall into the category of individuals present in the facility within the preceding 14 days who have tested positive for COVID-19 (or are awaiting test results, are exhibiting characteristic symptoms or have had contact with anyone who has tested positive in the previous 14 days)." This language obscures what the meaning of the 40 individuals tested by project UV.

⁸ *See*, <https://www.nbcnews.com/business/business-news/amazon-closes-new-jersey-warehouse-after-workers-test-positive-coronavirus-n1251894>.

employees tested positive), Amazon temporarily closed this facility from December 21 through December 26, 2020 during peak season. At the time, the county where the Robbinsville facility is located had a weekly average case rate of 47.2 per 100,000.⁹

11. Not only are cases currently trending higher in Jefferson County and with it the corresponding risk of contracting SARS-COV-2 from others in the community or simply coming into contact with an asymptomatic individual, these trends will not likely abate until after February. *See*, Union's Offer of Proof, Declaration of Dr. Suzanne E. Judd, ¶ 10-11. Dr. Judd notes that cases in Jefferson County have quadrupled since October 20, 2020 and are predicted to increase through January 20, 2021 largely because of holidays and social events that lead to large gatherings (e.g. the Alabama playing in College Football Finals). *Id.* at ¶ 10. Dr. Judd also notes that models predicting cases in Alabama and Jefferson County have not predicted cases counts accurately because they have failed to consider local trends. *Id.*

12. Hospitalization rates in Jefferson County are a compelling consideration for directing a mail ballot election. Hospitalization rates are at an all-time high for the state and Jefferson County. *See*, Union's Offer of Proof, Declaration of Dr. Suzanne E. Judd, ¶ 6. Because hospitals in the County have been overwhelmed with COVID hospitalizations, Jefferson County is not the place to travel to due to its hospitalization crisis. *Id.* The crisis will only get worse as the rise in cases from the Christmas and New Year's holidays start to impact the County's hospitals. *See*, <https://wbhm.org/feature/2021/overwhelmed-with-covid-patients-alabama-hospitals-near-crisis-level/> January 6, 2021. The problem is not simply that a person traveling to Jefferson County

⁹ Robbinsville is located in Mercer County, NJ. Indeed, 47.2 per 100,000 is still the rate in Mercer County. *See*, www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html#states. As of January 7, 2021, Mercer County has confirmed 19,897 COVID-19 cases, far fewer than Jefferson County AL. *See*, covid19.nj.gov (Data Dashboard) last visited 1-7-21.

might contract COVID-19 and possibly need medical care but that hospitals and their providers may not be able to care for someone needing emergency care unrelated to COVID-19. *Id.*

13. Amazon is not the first Employer to propose and tout its COVID-19 safety protocols as the reason why a manual election should be conducted even when the wider community is experiencing significant community transmission. For example, in *Golden State Foods*, 2020 NLRB Reg. Dir. Dec. Lexis 465 at *5-6 (Nov. 25, 2020), the Employer committed to provide the following:

- spacious polling area, sufficient to accommodate six-foot distancing, which will be marked on the floor with tape to ensure separation for observers, the Board Agent, and voters.
- a separate entrance and exit for voters, with markings to depict safe traffic flow through the polling area.
- separate tables spaced six feet apart so the Board Agent, observers, ballot booth, and ballot box are at least six feet apart from one another.
- sufficient disposable pencils without erasers for each voter to mark their ballot.
- glue sticks or tape to seal challenge-ballot envelopes.
- plexiglass barriers of sufficient size to separate observers and the Board Agent from voters and each other during the voting and to separate all individuals during the pre-election conference and ballot count.
- masks, hand sanitizer, gloves, and wipes for observers.
- allow an inspection of the polling area to be conducted by video conference at least 24 hours prior to the election so that the Board Agent and parties can view the polling area.
- provide and require voters, observers, party representatives, and other participants to wear CDC-conforming masks during all phases of the election, including the pre-election conference, in the polling area, and while observing the count.
- post signs in or immediately adjacent to the Notice of Election to notify voters, observers, party representatives and other participants of this requirement.
- provide the Region with required certifications regarding COVID-19.
- to hold the election outdoors and set up a tent in its parking lot, which is adjacent to the plant or if indoors in the Employer's conference room, place two air purifiers in the conference room.

14. The Employer's offer to make such arrangements and accommodations did not change the Region's analysis under *Aspirus*. Because the county where the Employer operated had a 14 day COVID positivity rate in excess of five (5) percent, the Regional Director had to consider the appropriateness of a mail ballot election. *Golden State Foods* 2020 NLRB Reg. Dir. Dec. Lexis 465 at * 10. Once a mail ballot election must be considered, the fact that the Employer commits to an extensive COVID safety protocol at the facility does not change the COVID conditions in the larger community and the risks such conditions pose to Board agents and employees gathering for purposes of conducting an election. In *Golden State Foods*, the Regional Direction directed a mail the County had a 14 day positivity rate of 5.75, a "situation" that under *Aspirus* permits the direction of a mail ballot election as an appropriate exercise of discretion. Every case decided after *Aspirus* where the county in question had a 14 day COVID positivity rate that exceeded five (5) percent has resulted in a mail ballot election.¹⁰ There is no reason Amazon

¹⁰ *Gallo Mechanical*, 2020 NLRB Reg. Dir. Dec. Lexis 472 (Dec. 2, 2020)(directing a mail ballot election because the 14 day COVID-19 positivity rate in the county was 9.3 percent and the fact that the County was experiencing substantial community spread); *Fairmount Behavioral Health*, 2020 NLRB Reg. Dir. Dec. Lexis 495 (Dec, 23, 2020)(directing a mail ballot election where county positivity rate was 12.57 percent; potential disenfranchisement of employees with COVID-19 and those that must quarantine, risk of cancelling manual election if Board agent fails temperature screen and the "scattered" schedules of employees); *Algunas, Inc.*, 2020 NLRB Reg. Dir. Dec. Lexis 488 (Dec, 17, 2020)(notwithstanding zero Covid-19 cases among employees and employer's proposed safety protocols, Regional Director ordered a mail ballot election where there was a 14 day increase in number of cases and 14 day county positivity rate ranged between 11 percent and 25 percent); *Aztech Plastering LLC*, 2020 NLRB Reg. Dir. Dec. Lexis 466 *14 (Nov. 25, 2020)(directing a mail ballot election where the county positivity rate was 14.7 percent and cases were increasing); *Hitachi Rail Honolulu JV*, 2020 NLRB Reg. Dir. Dec. Lexis 494 at * 16-17 (Dec, 21, 2020)(directing a mail ballot election even though the county positivity rate was 3.5 percent, but the county experienced a 55 percent increase in Covid-19 cases over the preceding 14 day period); *Xpress Global Systems, LLC*, 2020 NLRB Reg. Dir. Dec. Lexis 484 *22 (Dec. 15, 2020)(relying on John Hopkins University's Covid Status report which *Aspirus* indicates is a reliable data source and directing a mail ballot election where the county positivity rate was 8.2 percent and State cases were increasing); *Dyno Nobel, Inc.*, 2020 NLRB Reg. Dir. Dec. Lexis 486,*12-15 (Dec. 16, 2020)(directing a mail ballot election when the weekly county positivity rate

case should receive any different treatment than every other Employer faced with a mail ballot election; Amazon's vast resources and its willingness to put them to use should not and cannot influence the analysis applied in every other case where the Employer lacked the same resources.

15. Moreover, the Board has yet to overrule a Regional Director and order a manual election when the DDE directing a mail ballot election was consistent and followed the Board's guidance in *Aspirus*; not one case post *Aspirus* case finding that a Regional Director abused their discretion by ordering a mail ballot election when county level data showed that COVID-19 positivity rates exceeded five (5) percent and/or cases were increasing over the 14 day period preceding the DDE.¹¹

was 8.5 percent and a cumulative rate of 6.3 percent even though there little evidence that employees in the facility had contracted Covid-19, there was no mandatory telework order and no state order prohibiting the proposed manual election); *Pak Norwich Management*, 2020 NLRB Reg. Dir. Dec. Lexis 481 *22 (Dec. 11, 2020)(directing a mail ballot election in a county with a 4.2 percent positivity rate but with cases increasing over prior 14 day period and employer could not tell with members of the public entering its facilities were Covid-19 positive); *MERS Goodwill Industries*, 2020 NLRB Reg. Dir. Dec. Lexis 473, at *34 (Dec. 1, 2020)(directing a mail ballot election where during the week preceding the DDE, the county positivity rate was 36.6 percent); *K8E Trucking Inc.*, 2020 NLRB Reg. Dir. Dec. Lexis 478 (Dec. 7, 2020)(directing a mail ballot election where the county Covid-19 positivity rate was 10.7 percent); *M.C. Dean, Inc.*, 2020 NLRB Reg. Dir. Dec. Lexis 476, at *5-8 (Dec. 3, 2020)(directing a mail ballot election because the 14 day rate of Covid-19 cases in the District of Columbia was increasing even though the positivity rate was 3.8 percent but the surrounding jurisdictions all had positivity rates above 5 percent); *Bethlehem Haulage, Inc.* 2020 NLRB Reg. Dir. Dec. Lexis 496., at *33-34 (Dec. 23, 2020)(directing a mail ballot election even though both parties preferred a manual election because there was an increase in cases in the county during a 14 day period and the State positivity rate for the preceding 14 day period was 39.11 percent based on John Hopkins University Covid-19 Status Report; a positivity rate described as "extremely high."); *John Frick Tractor Co.*, 2020 NLRB Reg. Dir. Dec. Lexis 474 (Dec. 3, 2020)(directly a mail ballot election in a **six person** unit because the county's prior week positivity rate was 21.2 percent and increasing); *J. Pizzirusso Landscaping Corporation*, 2020 NLRB Reg. Dir. Dec. Lexis 489 (Dec. 22, 2020)(directing a mail ballot election where the county positivity rate was 3.5 percent as of the prior week but cases had been increasing over the preceding 14 day period).

¹¹ See, *CR&R Incorporated*, 2020 NLRB Lexis 566 (Nov. 24, 2020)(denying RFR noting "that the direction of a mail-ballot election was consistent with the concerns articulated in *Aspirus*

III. Amazon’s proposal regarding the conduct of a manual election (1) violates the principal of neutrality and (2) creates the impression that Amazon and not the Board controls the election, an impression that is highly prejudicial to the Union.

16. Amazon is not the first Employer to propose extensive safety procedures and protocols for conducting a manual election during this pandemic but it may be the first with the audacity to offer vehicles and drivers to transport agents from out of state to Birmingham and back, sanitized hotel rooms, food delivery and even an RV parked on its premises for use by Board agents. The offering of such benefits to Board agents clearly violates the principal that Board agents must remain neutral and avoid situations that create an appearance of partiality. *See, Provincial House Inc. v. NLRB*, 568 F. 2d 8, 10 (6th Cir. 1977)(noting that the Board in conducting representation elections must maintain and protect the integrity and neutrality of its procedures and holding that a Board agent who involuntarily found themselves part of a union organizing meeting created the appearance of partiality). It goes without saying that a Board agent accepting accommodations, food and transportation from an Employer or Union at minimum creates an appearance inconsistent with the principal of neutrality.

17. A separate but related reason Amazon’s offers of food, transportation, sleeping accommodations and the substantial expenditures related to putting up and equipping a temporary

Keweenaw.”); *Bunge Milling, LLC*, 2020 NLRB Lexis 567 (Nov. 25, 2020)(denying RFR noting “that the direction of a mail-ballot election was consistent with the concerns articulated in *Aspirus Keweenaw.*”); *Riverview Nursing Facility*, 2020 NLRB Lexis 573 (Nov. 30, 2020) denying RFR noting “that the direction of a mail-ballot election was consistent with the concerns articulated in *Aspirus Keweenaw.*”); *The Hearthside Food Solutions*, 2020 NLRB Lexis 572 (Dec. 1, 2020)(denying RFR noting “that the direction of a mail-ballot election was consistent with the concerns articulated in *Aspirus Keweenaw.*”); *ENEL North America*, 2020 NLRB Lexis 567 (Dec. 3, 2020)(denying RFR on the basis that at the time the DDE issued the regional office was operating under mandatory telework status and finding that she did not abuse her discretion in directing a mail ballot election).

large tent is that the Board may not accept such expenditures from private parties. Section 11302.2 of the Representation Casehandling Manual, when discussing whether the Board should pay for the rent of an offsite location for a representation election, states: “Rental expense, if any, should be borne by the Agency. (See Administrative Manual for procedures to be followed in making payment.). An offer of the parties to assume the expense should be rejected since the Agency cannot accept funds from private parties, as this would be a prohibited augmentation of its appropriations. *North American Plastics Corp.*, 326 NLRB 835 fn. 3 (1998).” Amazon’s offer to pay rental expenses associated with travel, accommodation, food delivery and erecting of a large tent with tables, chairs and other equipment should be rejected.

18. Amazon’s proposal also creates the impression that Amazon and not the Board controls the mechanics of the election. *North American Plastics Corp.*, 326 NLRB 835(1998)(observing that is it highly prejudicial for the Board to allow a process that creates the impression that the Employer and not the Board controls the mechanics of the election). Under its proposal, Amazon provides the tent, all the supplies (pencils, masks, hand sanitizer, plexiglass shields etc.) and will enforce mask wearing and sanitation requirements. Amazon will also operate the body temperature checking equipment which will determine whether an employee or even a Board agent is allowed on the premises during the election. Finally, Amazon proposes to use a “digital assistant” which will help monitor and police social distancing requirements.¹² Given the extent of Amazon’s proposed involvement in the arrangement and conduct of a manual election, it is difficult to see how the proposal avoids creating the impression that Amazon controls the

¹² Use of the “digital assistant” creates its own set of concerns. The technology uses a large television screen with a mounted sensor to determine six feet of distancing. Though Amazon represents that there is no recording of images, the Board cannot allow a device that appears to record an eligible voter anywhere near a polling place. Such an appearance of surveillance would undermine the integrity of the election.

mechanics of such election. Having to undertake such proposed measures simply to create an environment that minimizes the risk of COVID-19 transmission demonstrates that a manual election should not be conducted because it puts too many of the elements needed to conduct the election in Amazon's control.

IV. Amazon's concerns about mail service are overblown and remediable.

19. The Employer's contention that potential delays in mail service compel the conclusion that a mail ballot election should not be held is equally unavailing. First, the articles about mail delays cited by the Employer are more than three weeks old and all reference delays caused by the increase in the shipment of holiday packages because of the pandemic. The mailing of ballots in this case will occur well after any crush of holiday deliveries. Moreover, the USPS has recently published a report that despite the challenges of the pandemic, the agency delivered a historic number of ballots and election mail.¹³ According to the USPS report, it took on average 2.1 days to deliver ballots from election officials to voters and 1.6 days to deliver ballots from voters to election officials. In addition, 99.89% of ballots were delivered from voters to election officials within seven days. If we can trust the USPS with the critical mission of delivering millions of ballots during the presidential election (and most recently the Senate runoff elections in Georgia) we can certainly trust them with delivering approximately 5800 ballots in this case.

20. Second, with respect to alleged impediments to voter participation, all mail ballot elections "held at any time under any circumstances, include procedures by which an employee who has not received a ballot in a timely manner may receive a duplicate." *Dyno Nobel, Inc.*, 2020 NLRB Reg. Dir. Dec. Lexis 486, 18-RC-269009 *16 (December 16, 2020). This election if

¹³ See, *U.S. Postal Service Went to Extraordinary Lengths to Deliver Ballots During Historical General Election*, Postal News, Dec. 29, 2020 at https://about.usps.com/newsroom/national-releases/2020/USPS_PostElectionAnalysis_12_28_20.pdf

conducted by mail ballot will be no different. Moreover, the Board has yet to overrule the direction of a mail ballot election consistent with *Aspirus* on the grounds of potential mail service delays.

21. Finally, with respect to purported voter disenfranchisement issues with a mail ballot, there are significant risk of voter disenfranchisement in a manual election as well for any voter who is diagnosed with COVID-19 immediately preceding the election, must self-quarantine based on contact tracing, potential exposure or symptoms of COVID-19 or has a temperature or other symptoms on the day of the election. *Id.*

V. Conclusion.

For all the reasons articulated above, the Union requests that the Regional Director direct a mail ballot election and provide that ballots be mailed 14 days from the date of the DDE and with a requirement that ballots must be post-marked no later than 28 days after the mailing date.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Petitioner's Post Hearing Brief In Support of A Mail Ballot Election filed today, January 7, 2021, using the NLRB's e-filing system and was served by email upon the following:

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